



General Assembly

January Session, 2011

Raised Bill No. 6619

LCO No. 4842

04842_____JUD

Referred to Committee on Judiciary

Introduced by:
(JUD)

AN ACT CONCERNING UNFAIR BUSINESS PRACTICES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective October 1, 2011*) For the purposes of this
2 section and sections 2 to 10, inclusive, of this act:

3 (1) "Article or product" does not include food and beverages and
4 any services sold, offered for sale or made available in this state,
5 including restaurant services and any product subject to regulation by
6 the United States Food and Drug Administration that is primarily used
7 for medical or medicinal purposes.

8 (2) "Copyrightable end product" means a work within the subject
9 matter of copyright as specified by Section 102 of the United States
10 Copyright Act.

11 (3) "Manufacture" means to manufacture, produce or assemble an
12 article or product subject to section 2 of this act, in whole or substantial
13 part, but does not include contracting with or otherwise engaging
14 another person, or that person engaging another person, to develop,
15 manufacture, produce or assemble an article or product subject to

16 section 2 of this act.

17 (4) "Material competitive injury" means at least a three per cent price
18 difference between the article or product made in violation of section 2
19 of this act designed to harm competition and a directly competing
20 article or product that was manufactured without the use of stolen or
21 misappropriated information technology, such price difference
22 occurring over a four-month period of time.

23 (5) "Retail price" of stolen or misappropriated information
24 technology is the retail price of the information technology charged at
25 the time of, and in the jurisdiction where, the alleged theft or
26 misappropriation occurred, multiplied by the number of stolen or
27 misappropriated items used in the business operations of the person
28 alleged to have violated section 2 of this act.

29 (6) "Stolen or misappropriated information technology" means
30 hardware or software that the person referred to in section 2 of this act
31 acquired, appropriated or used without the authorization of the owner
32 of the information technology in violation of applicable law, but does
33 not include situations in which the hardware or software alleged to
34 have been stolen or misappropriated was not available for retail
35 purchase on a standalone basis at or before the time it was acquired,
36 appropriated or used by such person.

37 Sec. 2. (NEW) (*Effective October 1, 2011*) Any person who
38 manufactures any article or product while using stolen or
39 misappropriated information technology in its business operations
40 after notice and opportunity to cure as provided in section 5 of this act
41 and, with respect to remedies sought under subsection (e) of section 6
42 of this act or section 7 of this act, causes a material competitive injury
43 as a result of such use of stolen or misappropriated information
44 technology, shall be deemed to engage in an unfair act where such
45 article or product is sold or offered for sale in this state, either
46 separately or as a component of another article or product, and in
47 competition with an article or product that was manufactured without

48 violating this section. Any person who engages in such unfair act, and
49 any articles or products manufactured by such person in violation of
50 this section, shall be subject to the liabilities and remedial provisions of
51 sections 1 to 10, inclusive, of this act in an action by the Attorney
52 General or any person described in subsection (d) of section 6 of this
53 act, except as provided in sections 3, 4, 5 and 8 of this act. For the
54 purposes of this section, information technology shall be considered to
55 be used in a person's business operations if the person uses such
56 technology in the manufacture, distribution, marketing or sale of the
57 articles or products subject to this section.

58 Sec. 3. (NEW) (*Effective October 1, 2011*) No action may be brought
59 under sections 1 to 10, inclusive, of this act, and no liability shall result,
60 where:

61 (1) The end article or end product sold or offered for sale in this
62 state and alleged to violate section 2 of this act is: (A) A copyrightable
63 end product; (B) merchandise manufactured by or on behalf of, or
64 pursuant to a license from, a copyright owner, and which displays or
65 embodies a name, character, artwork or other indicia of or from a work
66 that falls within subparagraph (A) of this subdivision, or merchandise
67 manufactured by or on behalf of, or pursuant to a license from, a
68 copyright or trademark owner and which displays or embodies a
69 name, character, artwork or other indicia of or from a theme park,
70 theme park attraction or other facility associated with a theme park; or
71 (C) packaging, carrier media or promotional or advertising materials
72 for any end article, end product or merchandise that falls within
73 subparagraph (A) or (B) of this subdivision;

74 (2) The allegation that the information technology is stolen or
75 misappropriated is based on a claim that (A) the use of such
76 information technology infringes a patent or misappropriates a trade
77 secret under applicable law, or (B) could be brought under any
78 provision of Title 35 of the United States Code;

79 (3) The allegation that the information technology is stolen or

80 misappropriated is based on a claim that the defendant's use of the
81 information technology violates the terms of a license that allows users
82 to modify and redistribute any source code associated with the
83 technology free of charge; or

84 (4) The allegation is based on a claim that the person violated
85 section 2 of this act by aiding, abetting, facilitating or assisting
86 someone else to acquire, appropriate or use, or by providing someone
87 else with access to, information technology without authorization of
88 the owner of such information technology in violation of applicable
89 law.

90 Sec. 4. (NEW) (*Effective October 1, 2011*) No injunction may issue
91 against a person other than the person alleged to violate section 2 of
92 this act, and no attachment order may issue against articles or products
93 other than articles or products in which the person alleged to violate
94 section 2 of this act holds title. A person other than the person alleged
95 to violate section 2 of this act includes any person who contracts with
96 or otherwise engages another person to develop, manufacture,
97 produce, market, distribute, advertise or assemble an article or product
98 alleged to violate section 2 of this act.

99 Sec. 5. (NEW) (*Effective October 1, 2011*) (a) No action may be
100 brought under sections 1 to 10, inclusive, of this act unless the person
101 subject to section 2 of this act received written notice of the alleged use
102 of the stolen or misappropriated information technology from the
103 owner or exclusive licensee of the information technology or the
104 owner's agent and the person: (1) Failed to establish that its use of the
105 information technology in question did not violate section 2 of this act;
106 or (2) failed, within ninety days after receiving such notice, to cease use
107 of the owner's stolen or misappropriated information technology,
108 provided, if the person commences and thereafter proceeds diligently
109 to replace such information technology with information technology
110 whose use would not violate section 2 of this act, such period shall be
111 extended for an additional period not to exceed one hundred days

112 total. The information technology owner or its agent may extend any
113 period described in this subsection.

114 (b) To satisfy the requirements of subsection (a) of this section, a
115 written notice must: (1) Identify the stolen or misappropriated
116 information technology; (2) identify the lawful owner or exclusive
117 licensee of the information technology; (3) identify the applicable law
118 the person is alleged to be violating and state that the notifier has a
119 reasonable belief that the person has acquired, appropriated or used
120 the information technology in question without authorization of the
121 lawful owner in violation of such applicable law; (4) if known by the
122 notifier, state the manner in which such information technology is
123 being used by the person; (5) state the articles or products to which
124 such information technology relates; and (6) specify the basis and the
125 particular evidence upon which the notifier bases such allegation.

126 (c) The notification shall state, under penalty of perjury, that the
127 information in the notice is accurate based on the notifier's good faith
128 knowledge, information and belief.

129 Sec. 6. (NEW) (*Effective October 1, 2011*) (a) No earlier than ninety
130 days after the provision of notice in accordance with section 5 of this
131 act, the Attorney General, or a person described in subsection (d) of
132 this section, may bring an action against any person that is subject to
133 section 2 of this act:

134 (1) To enjoin violation of section 2 of this act, including by enjoining
135 any such person from selling or offering to sell in this state articles or
136 products that are subject to section 2 of this act.

137 (2) Only after a determination by the court that the person has
138 violated section 2 of this act, to recover the greater of:

139 (A) Actual damages, which may be imposed only against the person
140 who violated section 2 of this act; or

141 (B) Statutory damages of no more than three times the retail price of

142 the stolen or misappropriated information technology, which may be
143 imposed only against the person who violated section 2 of this act.

144 (b) (1) After determination by the court that a person has violated
145 section 2 of this act and entry of a judgment against the person for
146 violating section 2 of this act, the Attorney General, or a person
147 described in subsection (d) of this section, may add to the action a
148 claim for actual damages against a third party who sells or offers to sell
149 in this state articles or products made by that person in violation of
150 section 2 of this act, subject to the provisions of section 8 of this act;
151 provided, damages may be imposed against a third party only if:

152 (A) The third party was provided a copy of a written notice sent to
153 the person alleged to have violated section 2 of this act that satisfies the
154 requirements of section 5 of this act at least ninety days prior to the
155 entry of the judgment;

156 (B) The person who violated section 2 of this act did not make an
157 appearance or does not have sufficient attachable assets to satisfy a
158 judgment against it;

159 (C) Such person either manufactured the final article or product or
160 produced a component equal to thirty per cent or more of the value of
161 the final article or product; and

162 (D) Such person has a direct contractual relationship with the third
163 party respecting the manufacture of such final article or product or
164 component.

165 (2) An award of damages against such third party pursuant to
166 subdivision (1) of this subsection shall be the lesser of the retail price of
167 the stolen or misappropriated information technology at issue or two
168 hundred fifty thousand dollars.

169 (c) In an action under this section, a court may:

170 (1) Against the person found to have violated section 2 of this act,

171 increase the damages up to three times the damages authorized by
172 subdivision (2) of subsection (a) of this section where the court finds
173 that the person's use of the stolen or misappropriated information
174 technology was wilful;

175 (2) With respect to an award under subdivision (2) of subsection (a)
176 of this section only, award costs and reasonable attorney's fees to (A) a
177 prevailing plaintiff in actions brought by an injured person under
178 section 2 of this act; or (B) a prevailing defendant in actions brought by
179 an injured person; and

180 (3) With respect to an action under subsection (b) of this section
181 brought by a private plaintiff only, award costs and reasonable
182 attorney's fees to a third party who qualifies for an affirmative defense
183 under section 8 of this act; provided, with respect to a third party's
184 reliance on the affirmative defenses set forth in subdivisions (3) and (4)
185 of subsection (a) of section 8 of this act, the court may award costs and
186 reasonable attorney's fees only if all of the conduct on which the
187 affirmative defense is based was undertaken by the third party before
188 the plaintiff initiated the action pursuant to subsection (b) of this
189 section.

190 (d) A person shall be deemed to have been injured by the sale or
191 offer for sale of an article or product subject to section 2 of this act if
192 the person establishes by a preponderance of the evidence that:

193 (1) The person manufactures articles or products that are sold or
194 offered for sale in this state in competition with articles or products
195 that are subject to section 2 of this act;

196 (2) The person's articles or products were not manufactured using
197 stolen or misappropriated information technology in violation of
198 section 2 of this act; and

199 (3) The person suffered economic harm, which may be shown by
200 evidence that the retail price of the stolen or misappropriated

201 information technology was twenty thousand dollars or more.

202 (e) If the court determines that a person found to have violated
203 section 2 of this act lacks sufficient attachable assets in this state to
204 satisfy a judgment rendered against it, the court may enjoin the sale or
205 offering for sale in this state of any articles or products subject to
206 section 2 of this act, except as provided in section 4 of this act.

207 (f) The court shall determine whether a cure period longer than the
208 period reflected in section 5 of this act would be reasonable given the
209 nature of the use of the information technology that is the subject of
210 the action and the time reasonably necessary either to bring such use
211 into compliance with applicable law or to replace the information
212 technology with information technology that would not violate section
213 2 of this act. If the court deems that a longer cure period would be
214 reasonable, then the action shall be stayed until the end of that longer
215 cure period. If by the end of that longer cure period, the defendant has
216 established that its use of the information technology in question did
217 not violate section 2 of this act, or the defendant ceased use of the
218 stolen or misappropriated information technology, then the action
219 shall be dismissed.

220 Sec. 7. (NEW) (*Effective October 1, 2011*) In a case in which the court
221 is unable to obtain personal jurisdiction over a person subject to
222 section 2 of this act, the court may proceed in rem against any articles
223 or products alleged to be subject to section 2 of this act, including any
224 articles or products sold or offered for sale in this state. Except as
225 provided in section 4 of this act, all such articles or products shall be
226 subject to attachment at or after the time of filing a complaint,
227 regardless of the availability or amount of any monetary judgment.

228 Sec. 8. (NEW) (*Effective October 1, 2011*) (a) A court may not award
229 damages against any third party pursuant to subsection (b) of section 6
230 of this act where that party, after having been afforded reasonable
231 notice of at least ninety days and opportunity to plead any of the
232 affirmative defenses set forth below, establishes by a preponderance of

233 the evidence that:

234 (1) Such person is the end consumer or end user of an article or
235 product subject to section 2 of this act, or acquired the article or
236 product after its sale to an end consumer or end user;

237 (2) Such person is a business with annual revenues not in excess of
238 fifty million dollars;

239 (3) The person acquired the articles or products:

240 (A) In good faith reliance on either (i) a code of conduct or similar
241 written document that governs the person's commercial relationships
242 with the manufacturer alleged to have violated section 2 of this act and
243 which includes commitments, such as commitments to comply with
244 applicable laws, that prohibit use of the stolen or misappropriated
245 information technology by such manufacturer, or (ii) written
246 assurances from the manufacturer of such articles or products that
247 such articles or products, to the manufacturer's reasonable knowledge,
248 were manufactured without the use of stolen or misappropriated
249 information technology in the manufacturer's business operations;
250 provided, with respect to both clauses (i) and (ii) of this subparagraph,
251 that within one hundred eighty days of receiving written notice of the
252 judgment against the manufacturer for violation of section 2 of this act
253 and a copy of a written notice that satisfies the requirements of section
254 5 of this act, the person undertakes commercially reasonable efforts to:
255 (I) Exchange written or electronic correspondence confirming that such
256 manufacturer is not using such stolen or misappropriated information
257 technology in violation of section 2 of this act, which may be satisfied,
258 without limitation, by obtaining written assurances from the
259 manufacturer accompanied by copies of invoices, purchase orders,
260 licenses or other verification of lawful use of the information
261 technology at issue; (II) direct the manufacturer to cease the theft or
262 misappropriation, which may be satisfied, without limitation, by the
263 third party issuing a written directive to the manufacturer demanding
264 that it cease such theft or misappropriation and demanding that the

265 manufacturer provide the third party with copies of invoices, purchase
266 orders, licenses or other verification of lawful use of the information
267 technology at issue; or (III) in a case in which the manufacturer has
268 failed to cease the theft or misappropriation within such one-hundred-
269 eighty-day period, prevent the future acquisition of such articles or
270 products from such manufacturer during the period that such
271 manufacturer continues to engage in such theft or misappropriation
272 subject to section 2 of this act where doing so would not constitute a
273 breach of an agreement between the person and such manufacturer for
274 the manufacture of the articles or products in question that was
275 entered into on or before one hundred eighty days after the effective
276 date of this section; or

277 (B) Pursuant to an agreement between the person and a
278 manufacturer for the manufacture of the articles or products in
279 question that was entered into before one hundred eighty days after
280 the effective date of this section; provided, within one hundred eighty
281 days of receiving written notice of the judgment against the
282 manufacturer for violation of section 2 of this act and a copy of a
283 written notice that satisfies the requirements of section 5 of this act, the
284 person undertakes commercially reasonable efforts to: (i) Obtain from
285 such manufacturer written assurances that such manufacturer is not
286 using such stolen or misappropriated information technology in
287 violation of section 2 of this act, which may be satisfied, without
288 limitation, by obtaining written assurances from the manufacturer
289 accompanied by copies of invoices, purchase orders, licenses or other
290 verification of lawful use of the information technology at issue; (ii)
291 direct the manufacturer to cease such theft or misappropriation, which
292 may be satisfied, without limitation, by the third party issuing a
293 written directive to the manufacturer demanding that it cease such
294 theft or misappropriation and demanding that the manufacturer
295 provide the third party with copies of invoices, purchase orders,
296 licenses or other verification of lawful use of the information
297 technology at issue; or (iii) in a case in which the manufacturer has
298 failed to cease such theft or misappropriation within such one-

299 hundred-eighty-day period, cease the future acquisition of such
300 articles or products from such manufacturer during the period that
301 such manufacturer continues to engage in such theft or
302 misappropriation subject to section 2 of this act where doing so would
303 not constitute a breach of such agreement;

304 (4) The person has made commercially reasonable efforts to
305 implement practices and procedures to require its direct
306 manufacturers, in manufacturing articles or products for such person,
307 not to use stolen or misappropriated information technology in
308 violation of section 2 of this act. A person may satisfy this subdivision
309 by:

310 (A) Adopting and undertaking commercially reasonable efforts to
311 implement a code of conduct or similar written requirements, which
312 are applicable to the person's direct manufacturers, that prohibit use of
313 stolen or misappropriated information technology by such
314 manufacturer, subject to a right of audit, and such person either (i) has
315 a practice of auditing its direct manufacturers on a periodic basis in
316 accordance with generally accepted industry standards, or (ii) requires
317 in its agreements with its direct manufacturers that they submit to
318 audits by a third party, which may include a third party association of
319 businesses representing the owner of the stolen or misappropriated
320 information technology, and further provides that a failure to remedy
321 any deficiencies found in such audit that constitute a violation of
322 applicable law of the jurisdiction where the deficiency occurred shall
323 constitute a breach of the contract, subject to cure within a reasonable
324 period of time; or

325 (B) Adopting and undertaking commercially reasonable efforts to
326 implement a code of conduct or similar written requirements, which
327 are applicable to the person's direct manufacturers, that prohibit use of
328 stolen or misappropriated information technology by such
329 manufacturer, and the person undertakes practices and procedures to
330 address compliance with the prohibition against the use of the stolen

331 or misappropriated information technology in accordance with the
332 applicable code of conduct or written requirements; or

333 (5) The person does not have a contractual relationship with the
334 person alleged to have violated section 2 of this act respecting the
335 manufacture of the articles or products alleged to have been
336 manufactured in violation of section 2 of this act.

337 (b) The court shall not enforce any award for damages against such
338 third party until after the court has ruled on that party's claim of
339 eligibility for any of the affirmative defenses set out in subsection (a) of
340 this section. Any confidential or otherwise sensitive information
341 submitted by a party pursuant to subsection (a) of this section may be
342 subject to a protective order for good cause shown.

343 Sec. 9. (NEW) (*Effective October 1, 2011*) A court may not enforce an
344 award of damages against a third party pursuant to subsection (b) of
345 section 6 of this act for a period of eighteen months after the effective
346 date of this section.

347 Sec. 10. (NEW) (*Effective October 1, 2011*) A violation of section 2 of
348 this act may not be considered an unfair trade practice and chapter
349 735a of the general statutes does not apply to a violation of section 2 of
350 this act. The remedies provided by sections 1 to 9, inclusive, of this act
351 are the exclusive remedies for the parties.

This act shall take effect as follows and shall amend the following sections:		
Section 1	<i>October 1, 2011</i>	New section
Sec. 2	<i>October 1, 2011</i>	New section
Sec. 3	<i>October 1, 2011</i>	New section
Sec. 4	<i>October 1, 2011</i>	New section
Sec. 5	<i>October 1, 2011</i>	New section
Sec. 6	<i>October 1, 2011</i>	New section
Sec. 7	<i>October 1, 2011</i>	New section
Sec. 8	<i>October 1, 2011</i>	New section

Sec. 9	<i>October 1, 2011</i>	New section
Sec. 10	<i>October 1, 2011</i>	New section

Statement of Purpose:

To authorize an action against businesses that use stolen or misappropriated information technology to manufacture products that are sold or offered for sale in this state in competition with products manufactured without using stolen or misappropriated information technology.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]